

Exhibit 3-5 (Continued)

**Attorney General's Advisory Opinion: Authority of the North Carolina General Assembly and the State Board of Education to Supervise and Control the Administrative and Secretarial Duties of the State Superintendent of Public Instruction
(Article IX of the North Carolina Constitution; N.C.G.S. §§115C-19, and 115C-21)**

I. In *Guthrie v. Taylor*, 279 N.C. 703 (1971), cert. den., 406 U.S. 920 (1972), the Supreme Court held that the State Board of Education's powers are subject to limitation and revision by the General Assembly. In the *Guthrie* case, a teacher attacked a State Board of Education regulation that required teachers to renew their teaching certificates every five years by earning credits based on college courses completed at their own expense. The case arose under Article IX of the former Constitution which provided, in pertinent part, that: Sec. 8: "State Board of Education. - The general supervision and administration of the free public school system . . . shall . . . be vested in the State Board of Education . . ."

Sec. 9: "Powers and duties of the board. - The State Board of Education shall . . . have power . . . to regulate the grade, salary, and qualifications of teachers . . . and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly. *Guthrie*, 279 N.C. at 709-10, (emphasis added).

The Court then focused on the "subject to" language in former Section 9 and concluded that this clause empowered the General Assembly to limit and revise the State Board of Education's express constitutional powers, including the power to regulate teacher qualifications -- a supervisory power expressly included in the Constitution. The Court held that in the absence of legislation to the contrary, the State Board of Education had the authority to enact the challenged regulations:

The last sentence in Article IX, §9, above quoted, was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. The Constitution, itself, however, conferred upon the State Board of Education the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. Thus, in the silence of the General Assembly, the authority of the State Board of Education to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions of the Constitution itself. *Id.*, at 710. (emphasis added). The Court noted that the changes made in the 1971 Constitution (during the pending of the case) retained in §5 of Article IX the provision making the State Board of Education's powers "subject to the laws enacted by the General Assembly," and the Court concluded that "(t)here is no difference in substance between the powers of the State Board of Education with reference to this matter under the old and the new Constitutions." *Id.*

Without question, the Supreme Court decided in *Guthrie* that, even as to powers expressly conferred on the State Board of Education by the Constitution, exercise of the State Board of Education's enumerated powers is subject to laws enacted by the General Assembly. If the General Assembly may change the State Board of Education's enumerated constitutional powers and duties, the General Assembly likewise may change, the State Superintendent's enumerated constitutional powers and duties.

In *State v. Whittle Communications*, 328 N.C. 456 (1991), the Supreme Court held that the State Board of Education is bound by the General Assembly's policy determinations. In *State v. Whittle Communications*, the State Board of Education attempted to prevent local school districts from contracting with Whittle Communications for receipt of a short video news program known as Channel One. The determination of what type of educational materials could be presented to school children across the State logically comes within the ambit of the State Board of Education's constitutional power to "supervise and administer" the State's public school system. That is what the State Board of Education contended in court to support the rules it enacted to prevent local school boards from entering into Channel One contracts. However, the Supreme Court focused on the language in Article IX, §5 that the School Board's power was "subject to the laws enacted by the General Assembly" and concluded that "we must examine our statutes to ascertain whether the General Assembly has enacted laws which would limit the power of the State Board of Education in the area of selection of materials such as Channel One which we conclude is a supplementary instructional material." 328 N.C. at 464. The Court then concluded that the General Assembly had enacted a statute -- N.C.G.S. §115C-98(b) - that placed the responsibility for selection of supplementary materials in the hands of the local school boards. As a consequence, the Supreme Court held that the State Board of Education acted in excess of its authority by taking actions in contravention of that statute: Thus, the General Assembly, by adopting [N.C.G.S. §115C-98(b)] placed the decision making process for the selection and procurement of these supplementary instructional materials in the exclusive domain of the local school boards . . . Since Channel One is a supplementary instructional material and since the General Assembly placed the procurement and selection of supplementary instructional materials under the control of the local school boards, the State Board of Education acted in excess of its authority in enacting this rule because the State Board of Education had no authority to enact a rule on this subject. *Whittle Communications*, 328 N.C. at 466. The *Whittle* case made clear that the General Assembly has the preeminent constitutional power to make policy decisions relating to the public school system which are binding on the State Board of Education and the State Superintendent.

